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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Issued by the Department of Transportation on October 17, 2003

NOTICE OF ACTION TAKEN -- DOCKET OST-2002-13299 -59

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Application of EXPRESS.NET AIRLINES, LLC (Express.Net) filed 10/15/03 for:

XX Waiver of the Startup Condition in Order 2003-5-23;

Background

By Order 2003-5-23, the Department awarded Express.Net exemption authority to provide U.S.-Mexico all-cargo scheduled service over the following routes: (1) Dayton-Monterrey-Guadalajara-Mexico City; and (2) Dayton-El Paso-Chihuahua. That award was subject to the condition that Express.Net begin service on the routes by August 20, 2003. Once service was implemented, the route authority was further subject to a 90-day dormancy condition whereby the exemption authority for a given route(s) would become dormant if it were not used for a period of 90 days.

On August 15, 2003, Express.Net filed a request to waive the startup deadline for its Dayton-Monterrey-Guadalajara-Mexico City and its Dayton-El Paso-Chihuahua all-cargo services because it had not yet received its scheduled permit from the Mexican government to institute its U.S.-Mexico services. On August 29, 2003, we granted the carrier's request and waived the startup deadline through September 19, 2003.

On September 19, 2003, Express.Net filed a request to waive the startup deadline for its Dayton-El Paso-Chihuahua service. The carrier explained that it had received its scheduled permit from the Mexican government and had instituted the Dayton-Monterrey-Guadalajara-Mexico City all-cargo services, but that it had not yet obtained approval from the Mexican government to wetlease the aircraft needed to commence its Dayton-El Paso-Chihuahua service.¹ On September 19, 2003, we granted the carrier's request and waived the startup deadline through October 19, 2003.

Application

Subsequently, on October 15, 2003, Express.Net filed an application to waive, further, the startup deadline in the Dayton-El Paso-Chihuahua market because of continued delays in obtaining Mexican government approval of the wetlease arrangement with Ryan. Express.Net explains that representatives of Express.Net and Ryan continue to work with the Mexican authorities to resolve the wetlease issue satisfactorily, and that Express.Net and Ryan have also enlisted the assistance of the U.S. Embassy in Mexico City and U.S. negotiators in Washington, D.C.² Express.Net requests a 60-day extension of the startup deadline to allow time to resolve this matter and obtain the approval needed for the wetlease service on the Dayton-El Paso-Chihuahua route.

¹ Express.Net stated that, although it had originally proposed operating Dayton-El Paso-Chihuahua service using A-300 aircraft, traffic on the route had declined below levels that would support A-300 service. Express.Net explained, however, that the traffic was sufficient to require use of B-727 aircraft with approximately 10,000 pounds more capacity than Express.Net's own B-727 aircraft. In this regard, Express.Net stated that it had been working with Mexican aviation authorities to seek the approval of a wetlease arrangement with Ryan International Airlines, Inc. (Ryan) to operate Ryan's larger B-727s on the Dayton-El Paso-Chihuahua routing, but that it had not yet received such approval.

² Express.Net states that it continues to provide service with its own aircraft in the Dayton-Monterrey-Guadalajara-Mexico City market and that, pending receipt of the Mexican government wetlease authority, Ryan is operating Ryan's B-727 aircraft over the Dayton-El Paso-Chihuahua routing on a charter basis for Menlo Worldwide Forwarding (formerly Emery Worldwide Forwarding) five times per week.

Objections and Responsive Pleadings

Capital Cargo International (Capital) filed an objection to Express.Net's application. No other party opposed the request. Express.Net filed a reply to Capital's objection.

In its objection, Capital reiterates arguments it presented in the *2002 U.S.-Mexico All Cargo Exemption Service Case*, stating that Capital would be most likely of all of the applicants to fly the operations proposed, and its belief that Express.Net would not be able to operate its service proposal, including the use of A-300 aircraft in the El Paso-Chihuahua market. Capital states that, in its reply to the Department's show-cause order in the *Cargo Case*, Capital pointed out that Express.Net had recently substituted B-727 aircraft for A-300 aircraft in its charter operations on the El Paso-Chihuahua route. Capital notes that Express.Net explained, at the time, that the B-727 aircraft was substituted for a one-month period and that it would restore A-300 aircraft service when traffic increased, estimating May or June 2003. Capital states that the Department maintained that it had "no reason to believe that Express.Net will not institute regularly scheduled service in the subject markets with A-300 aircraft." Capital states that it would not object, and has not objected, to a reasonable extension to allow Express.Net time to pursue Mexican approvals for the A-300 operation in the subject market, but that it strongly objects to Express.Net's desire to "now reduce its operations from those proposed in its application, when the scheduled authority was awarded to Express.Net in part because of the additional capacity Express.Net unrealistically claimed it would operate." In this regard, Capital urges the Department to reopen the proceeding to award U.S.-Mexico all-cargo route authority.

In its reply, Express.Net urges the Department to reject Capital's attempt to prevent Express.Net from securing the Mexican government approvals needed for startup of its Dayton-El Paso-Chihuahua service. Express.Net states that it seeks a waiver of 60 days to permit U.S. government officials to continue negotiating with Mexican aviation authorities on Express.Net and Ryan's behalf. Express.Net states further that, although Capital states that it now objects to an extension because of Express.Net's use of B-727 aircraft, Capital did not oppose Express.Net's previous 30-day extension request which was sought by Express.Net and approved by the Department for the same purpose. Express.Net maintains that it has operated charter services in the Dayton-El Paso-Chihuahua market with A-300 aircraft and is committed to doing so again, as soon as traffic returns to previous levels; and that it is currently serving the top Mexico gateway of Mexico City over its Dayton-Monterrey-Guadalajara-Mexico City routing with A-300 aircraft.

Applicant rep: Lorraine B. Halloway (202) 624-2538 DOT analyst: Linda L. Lundell (202) 366-2336

DISPOSITION

XX Granted (see Remarks below)

The above action was effective when taken: October 17, 2003, through December 16, 2003³

Action taken by: **Paul L. Gretch, Director**
Office of International Aviation

Remarks: We found that grant of the requested waiver from the startup condition imposed on Express.Net's award in Order 2003-5-23 was in the public interest in the circumstances presented. In taking this action, we recognized that Express.Net had not yet received approval for the wetlease arrangement needed to commence service in the Dayton-El Paso-Chihuahua market; Express.Net and Ryan continue to work closely with the Mexican aviation authorities to secure this approval; and, at the request of Express.Net and Ryan, the U.S.

³ Express.Net's extension of the start-up deadline is effective through December 16, 2003, or until the date on which Express.Net begins service under the exemption authority awarded by Order 2003-5-23, whichever occurs earlier. Service not operated for a period of 90-days (once service under this exemption authority is inaugurated) will become dormant. The 90-day dormancy period with respect to the Dayton-El Paso-Chihuahua route will begin on the date Express.Net inaugurates service under this exemption authority.

Embassy in Mexico and the U.S. Department of Transportation continue to work closely with Mexican aviation authorities to resolve this matter and secure this approval.

Capital would have our decision on Express.Net's request turn on one thing - the type of aircraft to be used in the Dayton-El Paso-Chihuahua market. However, in awarding the authority in the *Cargo Case*, we found Express.Net to be the preferred carrier for a number of reasons. We similarly found a number of reasons why Capital was not the preferred choice.⁴ Against this background, we find nothing in the arguments of Capital that persuades us to change our result here or to otherwise alter our selection in the *Cargo Case*.⁵ In the circumstances presented, we believe that the public interest is best served by granting Express.Net's request here for a 60-day waiver of the startup deadline for the subject services.

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy, and (2) grant of the request was consistent with the public interest. To the extent not granted, we denied all requests in the referenced Docket. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

*An electric version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp*

⁴ See Orders 2003-3-20 and 2003-5-23.

⁵ We note that Express.Net has reassured us that it is committed to restoring A-300 service in the Dayton-El Paso-Chihuahua market as soon as possible.